No. 33443 – *Frank A. Savarese v. Allstate Insurance Company, Kim Jozsa, Lashwanda Carter, and Kira Hill*

**FILED**
**December 30, 2008**
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RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Starcher, J., dissenting:

I dissent because I believe that under *W.Va. Code*, 56-1-1(c), an insurance company's communications directed into West Virginia, and its communications with a West Virginia lawyer, in the resolution of a claim, are enough to confer subject-matter jurisdiction upon a West Virginia court in a lawsuit alleging the claim was mishandled.

The Allstate insurance policy at issue in this case contained $20,000.00 in first-party medical payments coverage. The appellant's West Virginia attorney (working from his Ohio County, West Virginia office) promptly and continuously submitted the appellant's numerous medical bills to Allstate for payment. Allstate addressed its correspondence to the attorney at his Ohio County, West Virginia office. The West Virginia attorney and Allstate also communicated via telephone. In these communications, Allstate intentionally, maliciously, and/or recklessly denied portions of the appellant's no-fault, first-party medical payments claims. Allstate provided little explanation for its denials in its communications, other than an abbreviated code for the denial.

Allstate's communications often directed the appellant's West Virginia attorney to secure additional information, documentation, records and/or bills from the appellant's West Virginia medical providers. The correspondence also asked the West Virginia attorney to secure authorization for Allstate to obtain the release of protected

medical information from those West Virginia medical providers. Allstate also sometimes sent carbon copies of the correspondence directly to the appellant's medical care providers in West Virginia.

Allstate often sent to the West Virginia attorney at his West Virginia office checks for partial payment of the appellant's claims for medical bills. And, Allstate sent some partial payments directly to the appellant's medical care providers located in West Virginia.

The appellant filed his lawsuit in West Virginia alleging that Allstate had acted in bad faith, in West Virginia, in resolving his insurance claim, because many of the actions that will support that claim occurred in, or were directed toward, West Virginia. Allstate filed a motion to dismiss the appellant's complaint for, among other reasons, lack of subject matter jurisdiction under *W.Va. Code*, 56-1-1(c) [2003]. That statute, which was repealed in 2007, formerly stated that:

> [A] nonresident of the state may not bring an action in a court of this state unless all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state[.]

The appellant argues that the circuit court erred in dismissing the appellant's claims by finding that a "substantial part" of the appellees' acts or omissions, which gave rise to the appellant's cause of action, did not occur in West Virginia. I believe that the circuit court and the majority opinion incorrectly found that, under *W.Va. Code*, 56-1-1(c) [2003], an out-of-state defendant's communications or correspondence, in furtherance of a breach of a contract or of a tortious act, and directed to recipients in West Virginia, does not

constitute an act or omission within West Virginia sufficient to confer jurisdiction upon a West Virginia court over the plaintiff's claims. Let me explain.

The scope of subject matter jurisdiction in the circuit courts of this State is very broad. The subject matter jurisdiction of the circuit courts is set forth in both the *West Virginia Constitution* and the *West Virginia Code*. The *West Virginia Constitution*, Article VIII, Section 6, states in part that the "[c]ircuit courts shall have original and general jurisdiction of all civil cases at law where the value or amount in controversy, exclusive of interests and costs, exceeds one hundred dollars unless such value or amount is increased by the legislature[.]" *W.Va. Code*, 51-2-2 reiterates this constitutional scope of jurisdiction, stating that the circuit courts, "except in cases confined exclusively by the Constitution to some other tribunal, have original jurisdiction of all matters at law where the amount in controversy, exclusive of interest, exceeds three hundred dollars[.]"

The threshold standard by which the circuit courts of this State may exercise subject matter jurisdiction in a given case requires a showing that:

> . . . 1) the court has the general power to grant the type of relief demanded under any circumstances; 2) the pleadings demonstrate that a set of facts may exist which could *arguably* invoke the court's jurisdiction; and 3) the allegations both with regard to the facts and the applicable law are of sufficient substance to require the court to make, in an adversary proceeding, a reasoned determination of its own jurisdiction.

*Eastern Associated Coal Corp. v. Doe*, 159 W.Va. 200, 210, 220 S.E.2d 672, 679 (1975). The appellant contends that he has a civil claim for monetary damages in excess of the jurisdictional minimums of the circuit courts of this State, and that he therefore can easily

overcome the threshold burden for subject matter jurisdiction. The circuit court did not disagree, but rather found that the appellant could not meet the threshold burden established by our venue statute, *W.Va. Code*, 56-1-1(c) [2003].

At the time of the circuit court's 2006 ruling, *W.Va. Code*, 56-1-1(c) contained a limitation on the scope of the subject matter jurisdiction of the circuit courts to entertain the claims of non-resident litigants. Specifically, the 2003 variant of *W.Va. Code*, 56-1-1(c) limited jurisdiction to those claims where "all or a substantial part of the acts or omissions giving rise to the claim asserted occurred in this state[.]"

The appellant concedes that the scope of *W.Va. Code*, 56-1-1(c) regarding what is a "substantial" act or omission is undefined. However, citing to persuasive federal authority, I believe that the appellant is correct in arguing that the appellees' communications directed to West Virginia recipients were substantial acts sufficient to confer subject matter jurisdiction.

The federal courts have repeatedly addressed the question of the meaning of "substantial" in the context of jurisdiction. The federal venue statute, 28 U.S.C. § 1391 (a)(2), provides that venue lies in any district "in which a *substantial part* of the events or omissions giving rise to the claim occurred[.]" (Emphasis added).

Congress adopted this statutory language in 1990 to open the federal venue statute to "the possibility that a claim may have arisen in more than one district[.]" *Hodson v. A.H. Robins Co.*, 528 F.Supp. 809, 814 (E.D.Va.1981). The federal venue statute thereby

greatly expanded the possible forums in which a plaintiff might choose to bring an action.[1] "[T]he plaintiff is not required to establish that his chosen venue 'has *the most* substantial contacts to the dispute; rather, it is sufficient that *a* substantial part of the events occurred [here], even if a greater part of the events occurred elsewhere.'" *Country Home Prods. v. Schiller-Pfeiffer, Inc.*, 350 F.Supp.2d 561, 568 (D.Vt.2004) (emphasis added, *citing Kirkpatrick v. Rays Group*, 71 F.Supp.2d 204, 212 (S.D.N.Y.1999)).

"[I]n determining whether events or omissions are sufficiently substantial to support venue . . . a court should not focus only on those matters that are in dispute or that directly led to the filing of the action. Rather, it should review the entire sequence of events underlying the claim." *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004) (citations omitted). *See also, Uffner v. La Reunion Francaise, S.A.*, 244 F.3d 38, 42 (1st Cir. 2001) ("We look, therefore, not to a single 'triggering event' prompting the action, but to the entire sequence of events underlying the claim."); *First of Mich. Corp. v. Bramlet*, 141 F.3d 260, 264 (6th Cir. 1998) ("Under § 1391(a)(2), we reiterate that the appropriate forum for a case is any forum in which a substantial part of the events or omissions giving rise to the claim

[1]The former venue statute, 28 U.S.C. 1391(a) [1988], provided that an action based on diversity of citizenship, like this one, could only be brought in the district "in which the claim arose." The federal venue statute was amended in 1990 "to make venue proper in any 'judicial district in which a substantial part of the events or omissions giving rise to the claim occurred.'" *Mitrano v. Hawes*, 377 F.3d 402, 405 (4th Cir. 2004). "Under the amended statute it is now absolutely clear that there can be more than one district in which a substantial part of the events giving rise to the claim occurred." Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3806 (1994).

occurred."); *Lee v. Corrections Corp. of America*, 525 F.Supp.2d 1238, 1241 (D.Hawai'i 2007) (same).

"However, an event need not be a point of dispute between the parties in order to constitute a substantial event giving rise to the claim." *Uffner*, 244 F.3d at 43. For federal venue purposes, "[t]he proper question is whether the district the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts." *FC Investment Group LC v. Lichtenstein*, 441 F.Supp.2d 3, 11 (D.D.C. 2006). *See also, Setco Enterprises Corp. v. Robbins*, 19 F.3d 1278, 1281 (8th Cir. 1994) ("[W]e no longer ask which district among two or more potential forums is the 'best' venue . . . Rather, we ask whether the district the plaintiff chose had a substantial connection to the claim, whether or not other forums had greater contacts.").

Federal authorities make it clear that correspondence and phone calls to a forum in furtherance of a tortious act may be substantial enough to create venue within that forum. For instance, in *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.*, 241 F.3d 135, 153-54 (2nd Cir. 2001), the court found that venue "may be satisfied by a communication transmitted to or from the district in which the cause of action was filed, given a sufficient relationship between the communication and the cause of action." *In accord, Sacody Techs., Inc. v. Avant, Inc.*, 862 F.Supp. 1152, 1157 (S.D.N.Y.1994). *See also, Bates v. C & S Adjusters, Inc.*, 980 F.2d 865, 868 (2nd Cir. 1992) ("We conclude that receipt [within the district] of a collection notice is a substantial part of the events giving rise to a claim under the Fair Debt Collection Practices Act [to establish venue within that district]"); *New Life*

*Brokerage Services, Inc. v. Cal-Surance Associates, Inc.*, 222 F.Supp.2d 94, 109-10 (D.Me. 2002) (venue was proper in Maine because the defendant "directed communications to Maine"); *FC Investment Group LC v. Lichtenstein*, 441 F.Supp.2d at 12 ("Because the communications by Mr. Lichtenstein to Mr. Eisenberg in the District of Columbia were a significant part of the sequence of events underlying the claims, venue is proper here."); *Gruntal & Co. v. Kauachi*, 1993 WL 33345, at *2 (S.D.N.Y. Feb. 5, 1993) (venue proper in common-law fraud action based on telephone calls during which fraudulent representations were made, where one party to the calls was within the district during the calls).

The appellants argue that the numerous phone calls and letters directed by the appellees primarily to the appellant's attorney in West Virginia are sufficient to establish jurisdiction in a West Virginia court over the appellant's first-party insurance claims. The appellant repeatedly makes clear that these communications centered upon the appellant's attempt to resolve his first-party claims against his medical payments insurance coverage with Allstate, and that the communications were separate from the appellant's third-party claims over the accident in Ohio. The appellant asserts that the Allstate appellees' phone calls, letters and other communications to West Virginia repeatedly demonstrated that the appellees were breaching Allstate's insurance contract with the appellant, and were engaging in other tortious conduct.

Applying language of 28 U.S.C. § 1391(a)(2) that is similar to *W.Va. Code*, 56-1-1(c), federal courts have permitted phone calls, letters, and facsimile transmissions to or from a district to stand alone as a basis for establishing venue in that district. For instance,

in *FC Investment Group v. Lichtenstein*, *supra*, the alleged wrongful acts occurred outside the District of Columbia, and involved companies in Illinois and Maryland. However, because the defendant had directed false communications to the plaintiff at an office located in the District of Columbia, and because the communications were "a significant part of the sequence of events underlying the claims," the case could be filed and proceed in the District of Columbia. 441 F.Supp.2d at 12. Likewise, in *U.S. Titan*, *supra*, the court found communications directed by a Chinese state-owned corporation to a broker in Connecticut, but later transmitted to the plaintiff in New York, sufficient to establish venue in New York. And in *Sacody Technologies*, *supra*, the court found that the defendants' communications over the telephone, in facsimiles and in letters to the plaintiff in New York were sufficient to establish venue in New York, where the communications related to the negotiation of an agreement that was subsequently breached by the defendant.

The appellants also point out that mere communications have also been sufficient to establish personal jurisdiction over a defendant. In *Murphy v. Erwin-Wassey, Inc.*, 460 F.2d 661, 664 (1st Cir. 1972), the court reasoned:

> We would be closing our eyes to the realities of modern business practices were we to hold that a corporation subjects itself to the jurisdiction of another state by sending a personal messenger into that state bearing a fraudulent misrepresentation but not when it follows the more ordinary course of employing the United States Postal Service as its messenger. Where a defendant knowingly sends into a state a false statement, intending that it should there be relied upon to the injury of a resident of that state, he has, for jurisdictional purposes, acted within that state.

(Citations omitted.) The court in *Murphy* went on to find that personal jurisdiction in Massachusetts over a New York-based defendant could be based on a series of phone calls and letters made to the plaintiff in Massachusetts. *Id*. Additional authorities can be found showing communications such as letters, telephone calls and e-mails generated in one state and received in another were sufficient to invoke personal jurisdiction over an out-of-state defendant that generated the communication. *See, e.g.*, *Vishay Intertechnology, Inc. v. Delta Int'l Corp.*, 696 F.2d 1062 (4th Cir. 1982) (three letters and five telephone calls to North Carolina sufficient to invoke personal jurisdiction over out-of-state defendant who directed those communications); *Verizon Online Services, Inc. v. Ralsky*, 203 F.Supp.2d 601, 613 (E.D.Va. 2002) ("spammer" who sent e-mails to millions of recipients could reasonably expect to be "haled into a court in any state" where the e-mails were received); *Workgroup Tech. Corp. v. MGM Grand Hotel, LLC*, 246 F.Supp.2d 102, 110 (D.Mass. 2003) ("at least four telephone calls, five emails, and three faxes" to a forum sufficient to invoke personal jurisdiction of the forum).

Reading these authorities together, I think it is fair to conclude that communications related to a wrongful act and directed to a West Virginia lawyer in his West Virginia office are sufficient to confer jurisdiction upon a West Virginia court over those wrongful acts.

Of course, I recognize that the communications at issue in this case weren't directed to the appellant, but to the appellant's attorney in West Virginia. But it was Allstate's communications to the attorney that were both the substance of the appellant's

cause of action, and the sole means by which the appellant discovered Allstate's allegedly tortious and wrongful acts, making it fair to ask whether a communication with an attorney is comparable to a communication with the client.

West Virginia law is clear that "a lawyer is an agent of his client." *May v. Seibert*, 164 W.Va. 673, 680, 264 S.E.2d 643, 646 (1980). As an agent of the client, the lawyer acts in the client's name and on his or her behalf. "An agent in the restricted and proper sense is a representative of his principal in business or contractual relations with third persons[.]" Syllabus Point 3, in part, *State ex rel. Key v. Bond*, 94 W.Va. 255, 118 S.E. 276 (1923). *In accord*, Syllabus Point 2, *Teter v. Old Colony Co.*, 190 W.Va. 711, 441 S.E.2d 728 (1994); Syllabus Point 3, *Thomson v. McGinnis*, 195 W.Va. 465, 465 S.E.2d 922 (1995).[2] Additionally, a lawyer has an ethical and professional duty to keep a client

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[2]In *State ex rel. Clark v. Blue Cross Blue Shield of West Virginia, Inc.*, 203 W.Va. 690, 714, 510 S.E.2d 764, 788 (1998), we offered additional authorities on the subject of agency:

> 3 Am.Jur.2d *Agency* § 1, at 509-10 (1986) ("The term 'agency' means a fiduciary relationship by which a party confides to another the management of some business to be transacted in the former's name or on his account, and by which such other assumes to do the business and render an account of it. It has also been defined as the fiduciary relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act. Thus, the term 'agency,' in its legal sense, always imports commercial or contractual dealings between two parties by and through the medium of another. In an agency relationship, . . . the one who acts for and represents the principal, and acquires his authority from him, is known and referred to as an 'agent.'" (footnotes omitted)); 2A C.J.S.

(continued...)

reasonably informed about the status of a matter, and to transmit communications with a client. *See* Rule 1.4, *West Virginia Rules of Professional Conduct*. Put simply, I believe that a communication directed to a client's lawyer may be considered as a communication to the client.

In applying the principles of these numerous authorities, it is clear that the majority opinion erred in finding that the appellees' communications to the appellant's attorney in the State of West Virginia, in furtherance of the appellees' allegedly wrongful conduct, were not substantial enough to establish subject matter jurisdiction under *W.Va. Code*, 56-1-1(c) [2003]. More specifically, the circuit court's holding, that "[a] mere communication to an attorney that a decision has been made, without more, cannot confer subject matter jurisdiction," was plainly wrong.

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[2](...continued)

> *Agency* § 4, at 552, 554-55 (1972) (stating that "[a]gency is succinctly defined as a relation created by an agreement between the parties; relationship between a principal and his agent; the representation of one called the principal by another called the agent in dealing with third persons; the relation resulting where one person authorizes another to act for him in business dealings with others," and defining agent as "one who acts for or in the place of another by authority from him; a person having express or implied authority to represent or act on behalf of another person who is called his principal; a person employed or authorized by another to act for him, or to transact business for him. . . ." (footnotes omitted)); 1A Michie's Jurisprudence *Agency* § 2, at 666 (1993) ("An agent is one who represents another, called the principal, in dealings with third persons. He is one who undertakes some business or to manage some affair for another by authority of or on account of the latter and to render an account of it." (footnotes omitted)).

The numerous federal authorities cited above interpret statutory language analogous to that found in *W.Va. Code*, 56-1-1(c) [2003], and I believe that the majority opinion should have found them to be persuasive authority as to the meaning of the phrase "substantial part of the acts or omissions giving rise to the claim asserted occurred in this state." I would have issued a syllabus point holding that in determining whether acts or omissions are sufficiently substantial to support jurisdiction under *W.Va. Code*, 56-1-1(c) [2003], a court should not focus on only a single "triggering event," on those matters that are in dispute, or on matters that directly led to the filing of the action. Rather, the court should review the entire sequence of events underlying the claim. Furthermore, I would have ruled that the jurisdictional requirement under *W.Va. Code*, 56-1-1(c) [2003] that "a substantial part of the acts or omissions giving rise to the claim asserted occur[] in this state" may be satisfied by a communication transmitted to or from West Virginia, given a sufficient relationship between the communication and the cause of action.

Considering the entire sequence of events underlying the appellant's claims, the appellees' communications were substantially related to some or all of the causes of action asserted by the appellant, and may therefore support a West Virginia court's assertion of subject matter jurisdiction under *W.Va. Code*, 56-1-1(c). I do not believe, under *W.Va. Code*, 56-1-1(c) that a court needed to find any one "triggering event" that prompted any of the appellant's causes of action in order to find jurisdiction in West Virginia. Appellee Allstate and its adjusters repeatedly directed correspondence and other communications to the State of West Virginia to purposefully and tortiously deprive the appellant of his

entitlement to insurance proceeds; to tortiously cause the appellant to suffer severe emotional distress; to communicate to the appellant the appellees' intent to breach the subject insurance contract; and/or to prove to the appellant that Allstate negligently trained and supervised its adjusters. Jurisdiction could therefore be asserted by a West Virginia court over these claims by the appellant.

I therefore respectfully dissent.